Supreme Court, U.S.
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NO. 95-817

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION — PETITIONER

V.

ROBERT SHERMAN ROBINSON — RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Robert Sherman Robinson, moves the Court pursuant to Sup. Ct. R. 39.1, for leave to proceed in forma pauperis. In support, he states:

1. This is a habeas corpus case. The respondent, Robert Robinson, is an inmate at the Cummins Unit of the Arkansas Department of Correction. Leave to proceed in forma pauperis was sought and granted in the federal district court and in the Eighth Circuit Court of Appeals. Robinson's indigent status has not changed.

2. Counsel for Robinson was appointed to represent Robinson in both the district court and in the Eighth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A.

Wherefore, the respondent, Robert Robinson, prays for leave to proceed in forma pauperis.

Respectfully submitted,

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Robert S. Robinson, Respondent

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LARRY NORRIS, DIRECTOR
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V.

ROBERT SHERMAN ROBINSON — RESPONDENT

ON WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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February 19, 1996

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REASONS FOR DENYING THE WRIT

The Court should deny Norris' petition for a writ of certiorari for either of three reasons. First, it is clear that a criminal defendant enjoys a Sixth Amendment right to counsel all the way through his first appeal of right. Second, Norris' position that the courts below improperly presumed prejudice is inconsistent with precedent from this Court establishing that the remedy for the unconstitutional denial of counsel must be fashioned according to the nature and stage of the proceedings at which the Sixth Amendment violation occurred. Finally, it would be improvident to grant certiorari in this case because a decision by this Court on the merits would not, as a practical matter, prevent anyone who was convicted in Arkansas between July 1, 1989 and January 1, 1991 (the "Rule 36.4 period") from seeking and obtaining post-conviction review on the merits of his/her claims of ineffective assistance of counsel. If certiorari is granted and the decision of the court below is affirmed, those who were convicted during the "Rule 36.4 period" may pursue their ineffective assistance claims with appointed counsel in the state courts. If certiorari is granted and the decision of the court below is reversed, these same individuals may still proceed to federal habeas court with their claims of ineffective assistance. In these cases, any procedural default defense raised by Norris would lack merit because of the inadequacy of the state law ground.

I.
THE POST-TRIAL STAGE OF A CRIMINAL PROCEEDING IS A "CRITICAL STAGE" TO WHICH THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES.

Under the Sixth Amendment, a defendant enjoys the right to counsel at all "critical stages" of his criminal case. Michigan v. Jackson, 475 U.S. 625 (1986). The actual denial of counsel at any such stage is per se prejudicial. United States v. Cronic, 466 U.S. 648 (1984).

Norris claims that neither Robinson, nor any other person convicted during the "Rule 36.4" period, had a Sixth Amendment right to counsel to file a motion for a new trial on ineffective-assistance-of-counsel grounds. Relying upon this Court's decisions in Coleman v. Thompson, 501 U.S. 722 (1991); Murray v. Giarratano, 492 U.S. 1 (1989); and Pennsylvania v. Finley, 481 U.S. 551 (1987), Norris takes the liberty of dubbing Ark. R. Crim. P. 36.4 as a "collateral," "post-conviction" remedy rather than a "direct" remedy. According to Norris, attaching such labels to Rule 36.4 automatically compels the conclusion that the Sixth Amendment is not implicated. Norris' position is unsound.

Norris does correctly assert that in Coleman v. Thompson, 501 U.S. 722 (1991), this Court held that there is no Sixth Amendment right to effective assistance of counsel to pursue "post-conviction" relief. However, Norris incorrectly believes that under Coleman, the distinction between post-trial, pre-appeal remedies and "post-conviction" remedies is one without a difference. Indeed, in Coleman this Court implicitly held that there is a constitutional distinction between the two.

In Coleman, this Court was faced with the argument that the failure of a habeas applicant's lawyer to timely file a notice of appeal from the denial of a petition for state habeas corpus relief established "cause". The Court first noted that under Virginia law, "ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in state habeas." 501 U.S. at 755. The Court went on to observe that the narrow issue before it was not whether ineffective assistance of counsel in the state habeas proceedings in the trial court could be asserted as "cause," but whether ineffective assistance of counsel on appeal to the state appellate court could be asserted as "cause." Id. Significantly, the Court held that because this was not Coleman's first appeal as of right, Coleman had no Sixth Amendment right to counsel on appeal from the denial of his state habeas petition, and ineffective assistance of that appellate counsel could not be asserted as "cause." The Court stated, id. at 753-757:

> Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), established that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), held that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. We based our holding in Douglas on that "equality demanded by the Fourteenth Amendment." 372 U.S., at 358, 83 S.Ct., at 817. Recognizing that "[a]bsolute equality is not required," we nonetheless held that "where the merits of the one and only appeal an indigent has as a right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Id., at 357, 83 S.Ct. at 816 (emphasis original).
>
> Coleman has had his "one and only appeal," if that is what a state collateral proceeding may be considered; the

> Buchanan County Circuit Court, after a two-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims. What Coleman requires here is a right to counsel on appeal from that determination. Our case law will not support it.
>
> In Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), and Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), we declined to extend the right to counsel beyond the first appeal of a criminal conviction. We held in Ross that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right. "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U.S., at 616, 94 S.Ct., at 2447. Similarly, in Finley we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review. 481 U.S., at 556, 107 S.Ct., at 1993-1994 (citing Ross, supra).
>
> These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel to appeal a state collateral determination of his claim of trial error.

In sum, the decision in Coleman was predicated on the facts that the Virginia post-conviction proceedings occurred after the affirmance of Coleman's direct appeal, that Coleman had actually enjoyed such a subsequent, "collateral," "post-conviction" hearing in the state trial court, and that what had been botched was the appeal from that hearing. This Court in Coleman thus made a clear constitutional distinction: A convicted defendant has a federal constitutional right to counsel all the way through his first appeal as of right. Beyond that point, i.e., beyond his "one and

only appeal," marks the beginning of the "post-conviction" process, and he "has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review...." 501 U.S. at 756.

This statement of the law is also entirely consistent with the Court's holdings in Finley, Ross v. Moffitt, 417 U.S. 600 (1974), and Giarratano. In Moffitt, the Court made it clear that the right to counsel indeed extends all the way through the first appeal of a criminal conviction. In Finley the Court similarly held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review, explaining that "post-conviction" relief is based on "a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction." 481 U.S. at 557 (emphasis added). In Giarratano, the Court followed suit and essentially did no more than say that the holding in Finley applied to capital as well as non-capital cases. (Giarratano and Coleman are also both cases involving Virginia's post-conviction process, which begins after direct review.)

Norris argues that Rule 36.4 provided for "collateral" proceedings, and since the Court in Coleman said that there is no right to counsel in state "collateral" proceedings, then Robinson had no right to counsel. According to Norris' logic, Robinson had a right to counsel through his trial and sentencing; then for a period of 30 days, he had no such right; but then, after the Rule 36.4 period expired, the right attached again, even though all of this took place prior to exhaustion of Robinson's direct appeal.

Norris' position is unsound and flies in the face of Coleman, Finley, and Moffitt: To hold that there is no constitutional right to counsel at a post-trial proceeding under Rule 36.4 (or in connection with some issue(s) arising during a Rule 36.4 proceeding) would create a bizarre and illogical situation where a right to counsel applied to some claims but not to others, or where a right to counsel did not attach in the initial proceedings and hearing but somehow attached thereafter in the appeal from those proceedings and hearing.

In sum, Rule 36.4 proceedings were all part and parcel of the direct review process. Without presenting, and thus preserving, one's Rule 36.4 issues, the direct appeal process could not possibly be full, fair, and meaningful. See Johnson v. Mizell, 912 F.2d 172, 176 (7th Cir. 1990) ("If a defendant has no post-trial counsel, prejudice might result from a failure to preserve an issue for appeal....[T]he prejudice to be avoided is the loss, through waiver, of a meaningful appellate issue, including the issue of ineffective assistance of trial counsel"); Menefield v. Borg, 881 F.2d 696 (9th Cir. 1989); Bland v. Alabama, 356 F.2d 8 (5th Cir.), cert. denied, 383 U.S. 947 (1966); Howard v. State, 291 Ark. 633, 727 S.W.2d 830 (1987); State v. Andrews, 228 Kan. 368, 614 P.2d 447 (1980); Trevino v.State, 565 S.W.2d 938 (Tex. Crim. App. 1978); Harper v. State, 201 So.2d 65 (Fla. 1967); People v. Huckstead, 91 Ill.2d 536, 65 Ill.Dec. 232, 440 N.E.2d 1248 (1982). Unquestionably, Robinson had a right to counsel through his direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985). It is also clear

beyond doubt that during the period of time that Rule 36.4 was in effect, ineffective assistance of counsel claims were reviewable on direct appeal as long as, but only if, they were raised in a Rule 36.4 motion for a new trial See Jones v. State, 308 Ark. 555, 826 S.W.2d 233 (1992). Thus, it defies logic and common sense to say that Robinson did not have a right to counsel to raise and preserve issues to make the direct appellate review process full, fair, and meaningful. To deprive him of a lawyer to raise issues that were required to be raised to the Arkansas Supreme Court as part of the direct review process would in effect deprive him of his right to complete appellate review. It would also run squarely afoul of this Court's admonition in Moffitt that the State must give convicted defendants such as Robinson "an adequate opportunity to present [their] claims fairly in the context of the State's appellate process." 417 U.S. at 616.

Furthermore, Ark. R. Crim. P. 36.4 was plainly not a true "post-conviction" vehicle, since the procedure was to take place before direct appellate review and thus before Robinson's conviction, and the convictions of those similarly situated, were final. In Graham v. Collins, 506 U.S. _____ (1993), this Court said that a conviction does not become "final" until certiorari has been denied or the time for filing a petition for a writ of certiorari has expired. Under Graham, Robinson's conviction had not become "final" at the time that his Rule 36.4 proceedings would have taken place; thus, a Rule 36.4 motion for a new trial cannot be considered a "collateral" attack.

II.
THE COURTS BELOW CORRECTLY HELD THAT A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL AT A "CRITICAL STAGE" IS PREJUDICIAL PER SE.

Norris also contends that the courts below erred in holding that the denial of Robinson's right to post-trial counsel was prejudicial per se. The basis of Norris' argument here is unclear, but whatever it is, the contention is unworthy of review by this Court. If indeed the post-trial stage of Robinson's criminal case was a "critical stage," the deprivation of his right to counsel is prejudicial per se. United States v. Cronic, supra.

Since the post-trial stage of Robinson's case was "critical," and since the Sixth Amendment violation here is prejudicial per se, the only real question is whether the courts below were correct in remedying the constitutional violation by ordering the State to provide Robinson with appointed counsel to pursue post-trial relief under Rule 36.4 in the state trial court. The courts below were indeed correct in fashioning such a remedy: The remedy for the denial of trial counsel is a new trial; Young v. Lockhart, 892 F.2d 1348 (8th Cir. 1989); the remedy for the denial of counsel at sentencing is ordinarily resentencing; Mempa v. Rhay, 389 U.S. 128 (1967); and the remedy for the denial of counsel on appeal is a new appeal. Penson v. Ohio, 488 U.S. 75 (1988). Thus, the remedy for the denial of post-trial counsel should obviously be a new post-trial proceeding. Thus, the courts below were obviously correct in holding that the remedy for the denial of Robinson's right to post-trial counsel is a new post-trial proceeding.

III.
ADDRESSING THE CLAIMS RAISED IN NORRIS' CERTIORARI PETITION WILL, AS A PRACTICAL MATTER, HAVE NO IMPACT UPON THOSE PERSONS IN ARKANSAS WHO WERE CONVICTED DURING ARKANSAS' "RULE 36.4 PERIOD."

It would be improvident to grant certiorari in this case for another, more practical reason, the validity of which Norris has already acknowledged in its certiorari petition (page 7) and in the petition for rehearing filed by him in the court below.

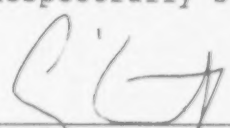
The reality here is this: Regardless of whether this Court grants certiorari in this case, any person who was convicted of a felony in Arkansas between July 1, 1989 and January 1, 1991 (the "Rule 36.4 period") and who desires a review on the merits of any claims of ineffective assistance of counsel that he may have can seek and obtain such a review. If certiorari is denied, or if certiorari is granted and the decision of the court below is affirmed, these individuals will obtain the review they seek through Rule 36.4 with appointed counsel. If certiorari is granted and the decision of the court below is reversed, these same individuals can still proceed directly to federal habeas court with their ineffective assistance claims for relief, and the inadequacy of the state law ground (Rule 36.4) will suffice to overcome any procedural default defenses that Norris might raise. See Michel v. Louisiana, 350 U.S. 91 (1955); Johnson v. Mississippi, 486 U.S. 578 (1988). (Indeed, the Eighth Circuit has provided clear indications in two recent cases that Rule 36.4 is not an adequate state ground. Pearson v. Norris, 52 F.3d 740 (8th Cir. 1995); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994)).

To sum it up, the only difference between the two possible outcomes in this case is that in the former situation, the applicant for relief would be required to begin the process of seeking relief in the state trial court, while in the latter situation, the applicant for relief would simply skip this step and proceed directly to federal habeas court. For this reason alone, granting certiorari would be improvident because resolving the issues raised by Norris will have no real impact upon convicted defendants in Arkansas seeking relief from their convictions.

CONCLUSION

Rule 10 of the Rules of the Supreme Court provides that review on a writ of certiorari will be granted only for compelling reasons. There are no such reasons present in this case. The Court should accordingly deny the petition for a writ of certiorari filed by the petitioner, Larry Norris.

Respectfully submitted,



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